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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENNETH LEE DUNCANTELL, Defendant and Appellant.	E053955 (Super.Ct.No. RIF10002270) OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge. (Retired judge of the former Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Kenneth Lee Duncantell appeals after he was convicted of possessing marijuana inside a prison, and of possessing the marijuana for sale. He contends that the trial court erred in admitting evidence of a prior conviction of possession of marijuana for sale; he argues that the evidence was more prejudicial than probative. Defendant further contends that imposition of a third strike sentence in this case violates federal and state constitutional prohibitions against cruel and unusual punishment. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Defendant was an inmate in the California Rehabilitation Center in Norco. On December 1, 2009, a correctional officer supervising one of the dormitories noticed that defendant was there, even though defendant was assigned to a different dormitory. When the officer approached defendant to ask why he was there, defendant said that he had come to pick up his identification card. The officer conducted a pat-down search and found five bindles of marijuana hidden in defendant's sock.

Defendant was turned over to additional corrections officers for further investigation. Defendant was eventually charged with one count of possession of marijuana in a penal institution (Pen. Code, § 4573.6), and one count of possession of marijuana for sale (Health & Saf. Code, § 11359). The information also alleged five prison term prior convictions (Pen. Code, § 667.5, subd. (b)), and two strike priors (Pen. Code, §§ 667, subds. (c)-(e)(2)(A) & 1170.12, subd. (c)(2)(A)).

It was stipulated at trial that the substance recovered from defendant in the five bindles amounted to a total of 1.3 grams of marijuana.

A correctional officer gave expert testimony at trial on the issue of access to and sales of controlled substances inside a correctional institution. The officer explained that inmates are restricted to their assigned dormitory. Other dormitories are off limits. Marijuana is contraband inside a prison facility. Selling marijuana inside a correctional facility differs somewhat from street sales because the available supply is more limited, but the demand is greater. The officer testified that inmates wrap individual doses in cellophane or other wrapping, called a "bindle." Bindles of marijuana inside a prison generally are packaged in quantities of 0.05 grams, and that such an amount is considered a useable quantity in the circumstances of a correctional facility. A bindle of 0.05 grams of marijuana sells for about $20 or $30, corresponding to a price of $200 per gram. Prison buyers generally possess smaller quantities for use than is typical for a user outside of prison; inmates use and possess smaller quantities to avoid detection. An inmate who possesses a controlled substance for personal use normally hides the bindles in his bunk. When the substances are meant for resale, they are carried on the person. Because defendant was carrying the marijuana on his person, because he was in an unauthorized area, and because he was carrying five separate bindles, the officer opined that defendant intended to sell the marijuana.

At the close of the People's case, the parties stipulated that the substance defendant possessed was marijuana, and that he had previously been convicted in 2004 of possession of marijuana for sale.

Defendant testified in his own behalf at trial. Defendant was incarcerated as a result of an attempted robbery conviction. He admitted the 2004 prior conviction of possession of marijuana for sale, as well as a conviction for auto theft in 1993, and a conviction for robbery in 1985.

Defendant testified that he had mistakenly left his identification card at the medical window. He went to the window to retrieve it, but was told that another inmate had picked it up to give it back to defendant. Therefore, defendant went to the other inmate's dormitory to find his card. Defendant had tried to "check in" with the correctional officer on duty, but found that he was in the bathroom. When the officer returned, he discovered defendant in the dormitory, where he did not reside. The officer searched defendant and found the marijuana in his sock.

Defendant claimed that he had just gotten the marijuana less than an hour earlier, which is why he had it in his sock. Defendant testified that he was HIV positive and that he used the marijuana to relieve pain and because he suffered from lack of appetite from his illness. Defendant said that another person had given him the marijuana, and he had received it packaged in the bindles as it was found in his sock. He also claimed that the amount of marijuana he had was worth only $30 to $50, not $200 as the officer had testified. Defendant said that he generally smoked two marijuana cigarettes per day, and

kept cigarette papers hidden in a locker in his cell. After his arrest, defendant was tested for drugs, and gave a positive result for THC, the active ingredient in marijuana. Defendant denied that he intended or planned to sell the marijuana.

On cross-examination, defendant admitted that he knew it was illegal to possess controlled substances inside a correctional facility. Defendant was also familiar with sales, packaging, and pricing for drugs, including marijuana, both inside and outside of prison. He stated that marijuana was "like cash" in prison.

In rebuttal, the correctional officer testified that the most common contraband in the prison is tobacco. In his experience, marijuana is never simply given away for free inside prison.

The jury convicted defendant of both charged offenses. The trial court declined to dismiss defendant's strike priors, and sentenced him on count 2 (possession of marijuana for sale) to a term of 25 years to life under the three strikes law. The court stayed the sentence on count 1 (possession of a controlled substance in a prison), pursuant to Penal Code section 654. The court stayed sentence on each of the five prison term priors.

Defendant now appeals, contending the trial court erred in admitting evidence of defendant's prior conviction for possession of marijuana for sale. He also contends that imposition of a term of 25 years to life under the three strikes law violates prohibitions against cruel and unusual punishment.

ANALYSIS

I. The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Defendant's Prior Conviction for Possession of Marijuana for Sale

Evidence Code section 1101 provides in pertinent part: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

The People moved before trial to admit evidence that defendant had previously been convicted in 2004 of possession of marijuana for sale. The People argued that the conviction was admissible under Evidence Code section 1101, subdivision (b), on the issue of defendant's knowledge of the nature of the material he possessed (marijuana) and his intent (i.e., to sell the marijuana). The court indicated that the parties had discussed whether the probative value of the evidence outweighed its prejudicial value, and the court tentatively determined that the evidence would be admitted. The court

stated that it would allow defense counsel to do further research, and to revisit the issue. The issue was not raised again before the parties stipulated to the conviction, at the close of the prosecution's case, and defendant admitted the conviction in his own testimony.

"'To be admissible to show intent, "the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance."'" (*People v. Davis* (2009) 46 Cal.4th 539, 602.) In addition, "Because evidence of other crimes may be highly inflammatory, the admission of such evidence '"'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.'"' [Citations.] Under Evidence Code section 352, the probative value of a defendant's prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.] 'We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.' [Citation.]" (*Ibid*.)

Defendant argues that the trial court erred in admitting the evidence of his prior conviction for possession of marijuana for sale, because it was effectively treated as character evidence, and not as evidence of intent. That is, the parties stipulated that he had been convicted in 2004 of the crime of possession of marijuana for sale, but no additional facts or background of the conviction were presented. Without those additional facts or background, the jury had no means of applying the conviction to the

issue of intent, but must have considered it as character evidence: Defendant was a drug dealer before, so he must have been dealing drugs in the instant case.

The criteria for admissibility of other crimes evidence are: "'(1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.) The evidence of defendant's prior conviction was properly admitted here.

First, the issue of intent was a material issue in this case. Defendant specifically denied that he intended to sell the marijuana; he testified that he possessed the five bindles of marijuana for personal use only.

Second, the prior offense did tend to prove defendant's intent. He stipulated to the fact of conviction, and admitted that he committed the crime of possession of marijuana for sale. Necessarily, that conviction encompassed a finding that defendant harbored the intent to sell marijuana on the earlier occasion. Having a particular state of mind or intent is not a character trait or "propensity." Rather, the fact of conviction for a similar offense gives rise, because of the similarity of the circumstances, to an inference of intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 [The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant """probably harbor[ed] the same intent in each instance."""].) The jury here was given limiting instructions, that it could

consider the prior offense only on the issues of credibility (impeachment by an offense of moral turpitude) and intent.

Third, the policy of Evidence Code section 352, weighing the prejudicial versus the probative value of the evidence, was not contravened by admission of the evidence. The prior conviction was very similar to the charge for which defendant was on trial. It involved possession of the same controlled substance, marijuana. It involved the same or similar intent issue, whether defendant intended to sell the marijuana. It specifically tended to negate defendant's claims about his less culpable state of mind, i.e., mere possession for personal use.

In any event, the admission of the evidence was not prejudicial. In the first place, whatever the court's tentative ruling on the issue, defendant ultimately stipulated to the admission of the fact of his conviction, and the offense of which he was convicted. He cannot now be heard to complain that he should have stipulated to the underlying facts of the conviction. In addition, it is not reasonably probable that the outcome would have been any different had the evidence of defendant's prior conviction not been admitted. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 808 ["'the erroneous admission of prior misconduct evidence does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded'"].) Defendant was in an area which was out-of-bounds for him, a dormitory where he was not assigned. He did not check in with the guard on duty, or wait for the guard to return. This cast considerable doubt on defendant's claim that he was only there to retrieve his

identification card from another inmate. Defendant was carrying five bindles of marijuana. The correctional officer who testified as an expert explained that, when an inmate has marijuana for personal use, he will normally stash it in his bunk. When an inmate intends to sell the marijuana, he carries it on his person. Defendant had five useable bindles of marijuana hidden in his sock. Defendant's story that someone had just given him the marijuana was contrary to the expert's experience; no one in prison gives away drugs for free.

The trial court did not abuse its discretion in admitting evidence of defendant's prior possession-for-sale conviction, and defendant was not prejudiced in any event.

II. Defendant's Sentence Does Not Constitute Cruel or Unusual Punishment

Defendant next contends that his sentence of 25 years to life (third strike) is grossly disproportionate to his offense, and thus violates the proportionality requirement of the Eighth Amendment of the United States Constitution, and is unconstitutional under article 1, section 17 of the California Constitution.

In May 2010, the People filed a complaint charging defendant with the felony offenses of possessing marijuana in a California correctional institution, and possessing marijuana for sale. In April 2011, the People amended the information to allege that defendant had suffered two prior strike convictions under the three strikes law. A jury convicted defendant of both felony counts, and the trial court found true both of the strike priors. The trial court declined, on defendant's request, to exercise its discretion to dismiss the strike priors under Penal Code section 1385. In making this determination,

the court observed that defendant "is somebody who is continually in trouble with the law. He has the two strikes, and I believe that I cannot say as a matter of law that this falls outside the realm of the purpose of the Three Strikes Law. . . . Not only did he choose to break the law[,] he was in custody when he was breaking the law at this point in a penal institution."

The court proceeded to impose a three-strikes sentence on count 2 (possession of marijuana for sale) of 25 years to life.

Defendant maintains that he was, in effect, sentenced to prison for the rest of his life, "and at least into his seventies," based solely upon possession of a small amount of marijuana for sale. He was age 47 at the time of sentencing, and will not be eligible for parole for almost another 30 years. He urges that this court "should find imposition of a life sentence under these facts constitutes cruel or unusual punishment as proscribed by both the State and Federal Constitutions."

"The Eighth Amendment to the United States Constitution 'contains a "narrow proportionality principle" that "applies to noncapital sentences." [Citations.]' (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 123 S.Ct. 1179].)" (*People v. Meneses* (2011) 193 Cal.App.4th 1087, 1092.) "The appropriate standard for determining whether a particular sentence for a term of years violates the Eighth Amendment is gross disproportionality. That is, '[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime. [Citations.]' (*Harmelin v.*

Michigan (1991) 501 U.S. 957, 1001 [115 L.Ed.2d 836, 111 S.Ct. 2680] (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288 [77 L.Ed.2d 637, 103 S.Ct. 3001].) Successful grossly disproportionate challenges are '"exceedingly rare"' and appear only in an '"extreme"' case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73 [155 L.Ed.2d 144, 123 S.Ct. 1166].)" (*People v. Em* (2009) 171 Cal.App.4th 964, 977.)

In *Ewing v. California*, *supra*, 538 U.S. 11, the defendant was sentenced to a term of 25 years to life for stealing three golf clubs, priced at $399 each. The United States Supreme Court held that the term of 25 years to life was not grossly disproportionate for the petty-theft-with-a-prior offense, where the defendant had been convicted of at least two prior serious or violent felonies.

Similarly, in *Lockyer v. Andrade*, *supra*, 538 U.S. 63, the defendant had received two consecutive terms of 25 years to life, for two counts of petty theft with a prior. Again, the defendant was a recidivist offender who had been previously convicted of at least two serious or violent felonies.

In weighing the gravity of a defendant's offenses, a court must consider both the defendant's criminal history and his or her current felony. (*Ewing v. California*, *supra*, 538 U.S. 11, 29.) Here, as the trial court had already noted with respect to its refusal to dismiss defendant's strike priors, defendant's criminal history was dismal, and his current offense displayed his utter indifference to the requirements of the law—he deliberately chose to break the law, even inside a penal institution. Defendant has failed to show that his case qualified as the "exceedingly rare" exception or "extreme" case of gross

disproportionality. He concedes that the People's analysis of the Eighth Amendment claim correctly represents the relevant decisions.

Defendant's state constitutional claim fares no better, however. Article 1, section 17 of the California Constitution prohibits cruel or unusual punishments. "Under this provision, a sentence will not be allowed to stand when it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity, considering defendant's history and the nature of the offense. (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.) Much like Eighth Amendment analysis, we consider the nature of the offense and the offender, with particular regard to the danger each presents to society, as well as the penalties prescribed in this state for more serious offenses and those prescribed in other states for the same offense. [Citation.]" (*People v. Blackwell* (2011) 202 Cal.App.4th 144, 158.)

Defendant focuses his argument primarily on the first prong, the nature of the offense and the offender, and the danger he presents to society. He concedes that he has suffered numerous prior convictions, but, "[a]s to this particular offense, . . . this is a possession of a small amount of marijuana for sale in prison, an offense which is neither violent nor serious when compared with other offenses carrying indeterminate terms."[1] We disagree. As defendant concedes, his substantial and serious prior record militates

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[1] With this comment, defendant's argument also implicates to some extent the second prong, i.e., punishments imposed for other offenses in the same jurisdiction.

against a finding that his sentence is disproportionate to "the nature of the offender." Further, defendant's attempt to minimize the nature of his current offense is unavailing. While not a violent offense, the possession of illicit drugs inside a correctional facility is very serious. While defendant's offense may not be, in itself, a violent one, he was a willing participant in an underground economy which seriously undermines the security, discipline, and other penological goals of the institution, and which is a driving force behind other acts which are violent. This offense shows that defendant plainly has no regard whatsoever for the requirements of the law, and repeated correction in the past has not deterred his continued lawless behavior.

Defendant has failed to show that his sentence was so disproportionate as to constitute cruel or unusual punishment.

DISPOSITION

The judgment is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P.J.

KING
J.